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COVENANT IN LEASE RESTRICTING USE OF THEATER SO AS TO EXCLUDE MOTION PICTURE PERFORMANCES.

In Asa G. Candler, Inc., v. Georgia Theater Co., 96 S. E. 226, decided by Georgia Supreme Court, it was held that a covenant in a lease of a theater for five years made in 1908 with the privilege of renewal for another five years, having a negative covenant that "the house will be operated at all times during the term of this lease or any renewal thereof as a first-class theater catering to the best class of people," amounted to an implied covenant, that it should not be used for motion picture performances, though they be "first class and catering to the best class of people."

In this particular case, however, it appeared that the lessee, both during the original period of the lease and after its renewal, exhibited moving pictures at all times in connection with spoken drama and during certain seasons exclusively, and he expended a large sum of money, with the knowledge of lessor and without objection to adapt the building to such use.

Therefore, it was held, that injunction should not be granted against him, because this harsh remedy should not issue where lessor had accepted the monthly rentals provided for. The existing status, therefore, should not be disturbed until the question of estoppel could be determined by a jury.

The view of the court as to the meaning of the restrictive covenant appears to us to be correct.

It was said: "The lease under consideration was executed in 1908. At that date moving pictures were in a very crude state of development. The contract by its terms was to continue over a period of five years with the privilege of renewal for a like period of five years. It was renewed in 1915. At the latter date moving pictures had reached a very high state of development; but words in a contract are ordinarily to be given their primary meaning at the time of the execution of the contract; and words of art, or words connected with a peculiar trade, are to be given the signification attached to them by experts in such art or trade. However, this rule is one of construction, and, like every such rule, is subordinate to the intention of the parties."

The court then speaks of the primary meaning of "theater," and its derivation from the Greek, and of the meaning of "theatrical" as embracing dramatic or spectacular representations. But it seems to us, that the qualification put upon the term theater restricts it very materially.

Thus it is said that the "house" is to be "operated at all times" as "a first-class theater, catering to best class of people." These words show there is a narrowness, that is referable to some conditions then existing. If the manner in confinement of the term could not be resolved at the date of the lease, the lessor could not be made to accept lessee's construction of what future conditions might bring about. It might be, that motion pictures would during the period of lease become of such dignity, and in popular acceptation become entirely satisfactory to the "best class of people." If, on the contrary, they occupied in the future a relatively lower stand, it would not be just for lessor's property to suffer in reputation. There was, therefore, a risk or chance to be taken by the lessor, and the plain intent was that this risk should be avoided.

Furthermore, motion pictures might at some time occupy a very unexceptionable position before the public, but soon they

might fall from their high estate, and legitimate drama supersede them in popular favor. And then, again, the motion picture art, as it has advanced, demands a vastly different arrangement from dramatic production, by means of living, speaking performers, than does the former. If there is to be reconstruction or rearrangement of a theatrical building, the lease should provide for this, and clauses for turning over the premises at the time of surrender in their original conditions. The failure of the lease to provide for this indicates that the premises leased as fit for dramatic productions were not to be converted to a substantially different use.

There is scarcely the same kind of a question as was decided in Kalem v. Harper, 222 U. S. 55, Ann. Cas. 1913 A. 1285, the case of a copyrighted book. There it was held that a moving picture was a dramatic reproduction. Rights under copyright law were there considered. But in the instant case there is question of reference *aliunde* to outside conditions, and these are to be considered as of the date of the lease. One contemplates no change of conditions in the future; the other does contemplate changes and provision is made for their exclusion, especially if they involved, or may involve, detriment to lessor.

NOTES OF IMPORTANT DECISIONS.

DAMAGES—AMOUNT RECOVERABLE FROM TORTFEASOR PRIMARILY LIABLE NOT MEASURE AS TO HIM SECONDARILY LIABLE.—In Charles v. Boston El. Ry. Co., 120 N. E. 69, decided by Supreme Judicial Court of Massachusetts, it is ruled, that where a street railway company was sued for injuries arising out of an excavation between its rails which caused the wife of plaintiff to be thrown out of a buggy, the insufficient guarding of the excavation primarily was negligence by a city, but the undertaking by the street railway to sufficiently guard the place made it liable and the damages recoverable were not as limited to what was recoverable from the city.

It appears that there is in Massachusetts a statute limiting recoveries against cities for damages to the sum of $1,000.

The court said: "The defendant's (street railway) liability on the death count was not limited to one thousand dollars. The excavation which caused the injury was made by the city of Boston. But since it extended under the tracks of the defendant, the latter for its convenience in operating its cars maintained a watchman to guard so much of the excavation as was between the rails and to prevent travelers from falling into it. The city was primarily responsible, having dug the hole in the street. Its liability in case action had been brought against it would have been limited under the statute to one thousand dollars. But liability for causing the death of a human being by negligence under all our statutes is in the nature of a penalty. It varies in amount with different classes of corporations. The defendant has sufficient interest in the matter of guarding this excavation in connection with the maintenance of its own business of transporting passengers to justify it in assuming the duty of guarding it and protecting the public from its dangers. Such an undertaking was not ultra vires. Therefore, for any act of negligence in this regard causing the death of anybody, it was liable to the penalty imposed by the statute upon it for such an offense."

Possibly this case is not one where primary liability is strictly to be considered, but without regard to whether the city or the street railway was responsible primarily or secondarily for the condition of the street, the latter, having a duty to perform because of its condition, is for neglect to perform it to be regarded pro tanto as primarily liable. The court held it did have a duty in the premises and for failure to perform that duty its liability arose. The bearing of this ruling is not necessarily to bar the street railway from recovery from the city for what the railway paid to the extent of $1,000. Between the city and it the circumstances of how the street became unsafe could be gone into more extensively than was necessary in the action at bar.

COMMERCE — FOREIGN CORPORATION ACTING AS SALES AGENT IN INTERSTATE SALES.—In American Distributing Co. v. Hayes Wheel Co., 250 Fed. 109, it was held on a motion for judgment non obstante veredicto, that motion should be denied where a foreign corporation not authorized to carry on business in products for sales in interstate commerce ob-

tained a verdict against a corporation, for which it was to solicit orders, where the statute provided that no foreign corporation could make a valid contract in the state until compliance with such statute. The selling company and its principal both had establishments in Michigan and there entered into the contract that was sued on in federal district court sitting in Michigan. It was claimed by defendant "that this contract was not in itself a sale in interstate commerce and did not directly involve commercial intercourse between the state of Michigan and another state, but was merely a business contract within the state of Michigan and therefore subject to the requirements of such state governing the validity of contracts. I cannot agree with this contention. It seems to me that counsel overlooks the fact that the very object of such contract was to provide for taking orders which would form part of transactions constituting interstate commerce to which the making of this contract was merely incidental. Being therefore so closely related to and connected with interstate commerce, the contract was, in my opinion, itself interstate commerce."

The court, as supporting its view, cited Rosenberger v. Pac. Express Co., 241 U. S. 56.

In that case a state statute imposing a license tax on express companies delivering C. O. D. shipments was held unconstitutional. But to us there is little of appositeness in the situation to fit the instant case. In the Rosenberger case there was a burden on the interstate carrier as to an article it was carrying and therefore a burden on the article itself. In the instant case there was merely an agency supported by a seller as to an article that was to come into interstate commerce. The arrangement was all of a preliminary nature. If nothing came into interstate commerce, the contract had no application.

It seems to us, that the whole scheme was for mere employment of an agent. This presumably entered into cost price of an article intended to go into interstate commerce. It could as well be said that the contract of the producer with its laborer was interstate in its characer, where the article is to go into that kind of trade.

DYING DECLARATIONS—ALIUNDE EVIDENCE SHOWING STATEMENT OF DECLARANT MERE OPINION.—In State v. Barnes, 204 S. W. 264, decided by Missouri Supreme Court, it was held, that where a declarant in a dying declaration made these statements, one that the man who killed him was "the man I had arrested last summer for robbing my house," and again "the man I had arrested last spring for robbing my house," and again "the man I had arrested for robbing my house," and there was evidence by defense that declarant said to police officers: "I think it was Elmer Barnes" and "I don't suspect anyone but Elmer Barnes," the court said the dying declaration was competent evidence.

Declarant was killed at night by an assassin and the only identification of him was by the dying statement of declarant, who lived from midnight of the murder to six o'clock in the morning, all of the statements to the police officers, as well as to others, being made within that time.

Speaking of the statements to the police officers the court said: "These statements, indicating mere suspicion instead of knowledge of the murderer's identity, made to the officers at a different time from those offered by the state in connection with the dying declaration, would not render that declaration incompetent; they would affect only its weight and credibility—a matter for the jury."

This ruling indicates that had it appeared that what declarant said to the police officers was made by him under the fear of impending death, this ought to have been introduced by the state and as thus coming into the case, and if the court was satisfied of their truth, all of the statements as a connected dying declaration should have been excluded, and it seems to us that it was the duty of the court to have ascertained if the mere bald statements made as to who was the murderer, should have been sifted by the court in passing on the question of admissibility. Important evidence of this kind should in no way depend for its admissibility on the order in which the party who put it came into the case. It is a rule, which we believe to be sound, that the state should introduce as a part of its case all of the eye witnesses to a murder, and if that is sound it ought to introduce all preliminary evidence to the admissibility of such evidence as was afterwards offered. This statement to the officers was not opposed to what was offered and received in chief. It really developed a situation and showed that at bottom there was nothing more involved than declarant's conclusion.

The rule as declared by 4 Chamberlayne on Modern Evidence, § 2849, is that: "In general, the dying declaration may properly cover whatever the declarant might legally have stated as a witness and nothing further." Ought not the court to have reconsidered its ruling on

the coming in of this evidence by the officers and then have passed adversely on the admissibility of the dying declarations, or explicitly to have instructed the jury as to the declarations that were admitted being not for consideration by the jury, if they believed declarant was merely stating his conclusion, suspicion or belief?

LIABILITY FOR SERVING UNWHOLESOME FOOD ON DINING CARS.

A number of interesting decisions have been made in suits by passengers claiming damages for illness resulting from being furnished unwholesome or impure food on dining cars operated by railway companies. The result of these decisions is that the law is well settled that the carrier is not liable as an insurer against sickness or injuries caused by the eating of unwholesome food but is only bound to exercise ordinary care. It warrants merely that the food it serves is of that class of food which is generally accepted as fit for ordinary human consumption, and that it has used that degree of care, in the selection and preparation of the food, which a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected to exercise in the selection and preparation of food for his own private table. Therefore, proof merely that plaintiff ate food on defendant's dining car, and thereafter became sick from the effects of the food, is not sufficient to charge the defendant with damages, in the absence of further proof of negligence. It must be shown that, in the selection and preparation of the food, the defendant failed to exercise the degree of care which the law requires, and the the injury was the result of such negligence, in order to render defendant liable.

In Valeri v. Pullman Company,[1] an action was brought to recover for personal injuries sustained by plaintiff through eating food served to her by defendant upon its buffet car. The complaint alleged that the food was unwholesome, but contained no allegation of negligence on the part of defendant, and sought to recover upon an implied warranty that the food was fit for consumption. In an opinion dismissing the complaint upon the merits, the court said:

"The case at bar comes to this: In the absence of any specific authority in the federal decisions, is there any ground in reason for imposing upon a restaurant keeper an obligation to furnish wholesome food to his patrons at all hazards; that is to say, is his obligation that of an absolute insurer of his food? Of one thing I feel reasonably clear, that no such obligation was ever imposed upon innkeepers or victualers under the English common law. In spite of the most exhaustive briefs of counsel in this case, no decision of the English courts has been pointed out, indicating the existence of such an obligation, and it seems to me most unlikely that such an obligation was ever recognized in the common law, using that word now in a historical sense, or it would have been enforced in numerous adjudicated cases. The opportunity for actions involving the breach of such an obligation has been far too common, and the absolute liability long imposed upon an innkeeper in respect to the goods of his guests has furnished too close an analogy to such an obligation, to permit the innkeeper to escape if the obligation had ever been thought to exist at common law.

"The courts have enforced certain rules, or absolute liability in the case of innkeepers' common carriers, owners of vicious animals, manufacturers of poisonous drugs, and in England, under the doctrine enunciated in Rylands v. Fletcher,[2] in the case of persons who bring upon their lands elements likely to do mischief if they should escape.

"My own feeling is that protection to the public lies not so much in extending the absolute liability of individuals, as in regulating lines of business in which the public has a particular interest in such a way as reasonably to insure its safety. In other words, pure food laws, and rigorous inspection of meats, canning factories, and

(1) 218 Fed. 519.

(2) 3 H. L. 330.

other sources of food supply, would seem to me a much more effective way of protecting the public than by the imposition of the liability of an insurer upon those who furnish food. The former method corrects the evil at its source. The latter method only imposes an obligation in cases which *ex hypothesi* cannot be guarded against by the individual by the exercise of due care. It shifts the loss from the person immediately suffering the injury to a person who has neglected no precaution in supplying the food. This certainly is not in accord with the general tendencies of the common law. I am inclined to think that the imposition of such an obligation would lead in the long run to the prosecution of unfounded claims, rather than to the protection of individuals or the public.

* * * * * *

"In my opinion there is no well-considered authority and no public policy which afford any justification for imposing upon the defendant the absolute liability of an insurer of its food, and I deem that the only obligation of the defendant, or any keeper of a restaurant or inn, is to exercise the reasonable care of a prudent man in furnishing and serving food."

In Travis v. Louisville & Nashville R. Co.,[3] plaintiff was a passenger on a train of defendant, and went into its dining car and ate some fried oysters and some scrambled eggs. Shortly thereafter he was taken sick and symptoms all indicated that his sickness was probably due to the food eaten while in the dining car. Plaintiff was of opinion that the oysters served him on the dining car were spoiled, and that defendant's servants or agents were guilty of negligence in serving him the oysters in their alleged spoiled condition. Suit was brought for the recovery of damages which plaintiff alleged he suffered by reason of such alleged negligence.

The Code of Alabama provides that "any butcher or other person who sells, or offers or exposes for sale, or suffers his apprentice, servant, agent, or other person for him, to sell, offer, or expose for sale, any tainted, putrid, or unwholesome fish or flesh, or the flesh of any animal dying otherwise than by slaughter, or slaughtered when diseased, for the purpose of being sold or offered for sale, must, on conviction, be fined not less than twenty nor more than two hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than six months."

From a judgment for defendant, the plaintiff appealed. The court, while reversing the case on another point, had this to say as to the duty of defendant in the matter of care in the selection and serving of food upon its dining car:

"The above statute is not aimed at but was passed for the benefit of hotels, restaurants, and public eating houses, as well as for the benefit of those who prepare and eat their food at their own homes.

"A butcher, market man, or other person who sells fish, flesh, etc., to hotel keepers, restaurant keepers, public entertainers, or to private individuals should know something about when the fish or the animal whose flesh he sells was killed, and how it has been kept since it was killed, and as his customers must rely in large measure upon his diligence, good faith, and intelligence, the above statute was passed for the purpose of enforcing the performance of a duty which the nature of such occupations creates in favor of the public. Common experience teaches that public entertainers as well as private individuals must, in a great measure, rely upon the honesty and good sense of the man from whom they purchase the supplies which find their way through the kitchen to the dining room.

"The first count of the complaint was drawn upon the theory that, under the terms of the above-quoted statute, the defendant was liable to the plaintiff if the oysters were in fact spoiled and his sickness was created by reason thereof, although neither the defendant nor any of its servants or agents were guilty of any act of negligence in or about said oysters or in or about serving them to the plaintiff.

"The above statute has no application to the facts of this case, and the trial court was free from error in sustaining the defendant's demurrer to said count.

(3) (Ala.), 62 So. 851.

"A restaurant keeper warrants that the food which he serves in his restaurant belongs to that class of food which is generally accepted to be fit for ordinary human consumption, and that he has used, in the selection and preparation of his food, that degree of care which the law exacts of those who follow his occupation for a livelihood. The law requires that, in the selection of the food for his restaurant and in cooking it for his customers, he shall exercise that same degree of care which a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected to exercise in the selection and preparation of food for his own private table. If, in the selection of such food or in preparing it for his customer, the keeper of a restaurant does not exercise that care, and through such want of care his customer who eats the food so selected and prepared is thereby made sick, then he is liable to such customer for the damages so suffered by him.[4]

The complaint in Bigelow v. Maine Central Railroad Co.,[5] alleged injury to plaintiff's health from eating unwholesome and poisonous asparagus served on toast, the asparagus having been packed by a reputable canning concern and bearing a standard label. The can of asparagus complained of was purchased by defendant on either the 15th or the 17th of February, and was served on February 25. It was shown that no precaution was omitted by the carrier in the matter of the inspection of its dining car; that the can, so far as the chef was able to observe, was perfect, and nothing in the appearance, taste, or odor of the asparagus indicated anything wrong with its condition. The plaintiff, however, admitting all these claims to be true, contended that the strict rule of law which prevails in this class of cases would hold the defendant responsible. She claimed that, under the plaintiff's declaration, it was not necessary for her to show privity of contract or negligence, and that due care was no defense; that the defendant, from the nature of its business, was bound to know the unwholesome condition of the food; that the defendant impliedly represented and guaranteed that the food was wholesome and fit for consumption, and that if it was not, and the party eating it was injured, defendant was liable. The court said:

"The plaintiff's contention is that the defendant in this class of cases is an insurer of the quality of the product which it serves. We are unable to believe that this is a sound rule, when confined to the sale or use of canned goods.

"It has been the boast of the common law that it was able to adjust itself to the inevitable vicissitudes and changes that occur in the development of industrial life, business methods, social progress, and scientific invention. Within the last century has appeared from time to time the discovery of devices that have revolutionized the methods and accomplishments of human effort. The subjugation of steam and control of electricity, and the consequent inventions for their practical use, have become instrumental in introducing an epoch in the history of science. Industrial, commercial, and financial projects have also assumed new forms and employed new methods. Yet, to the adjustment of all the new and varied relations arising from the adoption, application, and use of these new agencies and new methods, the principles of the common law have adapted themselves so aptly as to render almost imperceptible the radical transitions that have taken place.

"Of little less importance than the appearance of the great achievements referred to is the establishment and development of the canning industry in this country and in other parts of the world. It may be said that the art of canning, if not invented within the last century, has, at least, assumed the vast proportions which it has now attained, within a comparatively few years. It involves a unique and peculiar method of distributing, for domestic and foreign use, almost every product known to the art of husbandry. The wholesaler, the retailer, and the user of these goods, whether in the capacity of caterer, seller, or host, sustain an entirely different duty, respecting a knowledge of their contents

(4) Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715.

(5) (Me.), 85 Atl. 396.

and quality, than prevails with regard to knowing the quality of those food products which are open to the inspection of the seller or victualer. With reference to these it may well be considered, as has been held, that having an opportunity to investigate, and thereby to know the quality of their merchandise, they are charged with a responsibility amounting to a practical guaranty.

"The early rules of law were formulated upon the theory that the provision dealer and the victualer, having an opportunity to observe and inspect the appearance and quality of the food products they offered to the public, were accordingly charged with knowledge of their imperfections.[6] But, upon the state of facts in the case at bar, a situation arises that cannot in the practical conduct of the canning business fall within these rules. No knowledge of the original or present contents of a perfect appearing can is possible in the practical use of canned products. They cannot be chemically analyzed every time they are used. Accordingly, the reason for the rule having ceased, a new rule should be applied to the sale and use of canned goods that will more nearly harmonize with what is rational and just.

"The statement of facts before us shows that the asparagus served to the plaintiff was of a very high brand, sold by a most reputable firm, guaranteed under the Pure Food Law, and without fault or blemish discoverable to the eye, to the smell, or taste. It was apparently a perfect can of what it purported to contain. The plaintiff in February must have known it was a canned product when she ordered it.[7] Upon her order she was entitled to a reputable brand, packed and inspected in accordance with approved methods, and the law implied a warranty on the part of the defendant to furnish it. This obligation was fully met. But what was the legal relation sustained by the plaintiff and defendant with respect to their knowledge, or means of knowledge, of this can of asparagus? It seems to us they were absolutely mutual. * * * With regard to this knowledge or means of obtaining it, they were upon a perfectly equal footing. The plaintiff and the defendant necessarily understood the situation precisely alike. There could be no mistake. The plaintiff knew, or should be charged with knowledge, that the defendant could have no possible information concerning the contents of that can which she did not have. We know of no rule of law which will imply a warranty of that which it is impossible for a defendant to know by the exercise of any skill, knowledge, or investigation, however great. In other words, neither law nor reason require impossibilities. As was said by Chief Justice Shaw in Windsor v. Lombard, with reference to the inference of an implied warranty in a sale of fish: 'In applying this rule to the present case, the question is what did the parties mutually understand by their contract, as it was reduced to writing.' If we apply this rule to the case at bar, the only possible conclusion is that the parties understood the matter precisely alike, and that the defendant sold, and the plaintiff bought, exactly what she ordered. She, therefore, assumed the risk of its imperfections, as there was no possible way, either for her or the defendant, consistent with the practical use of the product, to test its quality."

Cases arising from eating food in restaurants are analogous and to like effect. Thus in Merrill v. Hodson,[8] plaintiff alleged that she was made sick and suffered severely in health as a result of having partaken of a dish known as "creamed sweetbreads," served to her by defendant's restaurant. It was alleged that the food served was "sold" to the plaintiff, and that its sale was attended with the implied warranty that it was wholesome and fit for consumption. It was held that there was no such implied warranty, since the transaction did not constitute a sale, but a rendition of service. Discussing the transaction of service of food to a patron of a restaurant, the court said:

"A restaurant keeper differs from an innkeeper in that he furnishes only food, or food and drink, and not lodging or shelter. Beale, Innkeepers and Hotels, sections 35, 301. In so far as the character of the service performed to their respec-

(6) Windsor v. Lombard, 18 Pick. (Mass.) 57; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. St. Rep. 715.

(7) Windsor v. Lombard, 18 Pick. (Mass.) 57.

(8) (Conn.), 91 Atl. 533.

tive patrons is concerned, it is the same * * *. In neither case does the transaction, in so far as it involves the supply of food or drink to customers, partake of the character of a sale of goods. The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is carved for his use, or of that which finds a place upon his plate, or in side dishes set about it. No designated portion becomes his. He is privileged to eat, and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need of desire—ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food supplied as a factor of the service rendered."

Concluding from this line of reasoning that the transaction was not a sale, and, therefore, there was no implied warranty such as was provided for in the sales act of the state, the court states that the situation was not different at common law, and that apparently the pertinent section of the sales act was taken directly from its English predecessor. The court continues:

"This being the case, we may safely look for light in resolving the question before us to common-law cases, as well as to any which may have arisen under modern sales legislation. As far as we are aware no case of the latter sort, save the present, has ever reached an appellate tribunal. Of common-law cases we find the following four: Sheffer v. Willoughly, 163 Ill. 518, 34 L. R. A. 464, 54 Am. St. Rep. 483, 45 N. E. 253; Crocker v. Baltimore Dairy Lunch Co., 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914-B, 884; Pantaze v. West, 7 Ala. App. 599, 61 So. 42; Doyle v. Fuerst & Kraemer, 129 La. 838, 40 L. R. A. (N. S.) 480, Ann. Cas. 1913-B, 1110, 56 So. 906. In all of them the right of action was based upon negligence. We know of no case aside from the present, in which an attempt has ever been made in cases brought to recover for the harmful consequences resulting from unwholesome food or drink supplied by the keeper of an inn, restaurant, or boarding house in the line of his business, to recover upon the strength of an implied condition or warranty of quality. Those which have grown out of a sale of provisions by a dealer are, of course, not in point. In the first of the cited cases the obligations of a restaurant keeper are discussed, and a statement of the law made which very plainly means, and has been generally understood to mean, that the only remedy for the consequences of eating unwholesome food supplied by an innkeeper or restaurant keeper in the regular course of his business is one for lack of due care."

Sheffer v. Willoughby was an action brought to recover damages alleged to have resulted from eating by plaintiff of oysters served to her by defendant in his restaurant, which oysters were alleged to have been unwholesome and to have caused plaintiff serious illness. Holding that proof of the injury following the eating of the unwholesome food was not sufficient to make a prima facie case in plaintiff's favor, nor to shift the burden upon defendant to establish due care, the court said:

"It will be observed that plaintiff, in her declaration, averred that the defendants, as restaurant keepers, served plaintiff with oysters, and 'carelessly, negligently, and unskillfully, and through carelessness,' did 'deliver to the plaintiff, to be by her eaten,

an oyster stew that was not good or wholesome, but deleterious, dangerous and poisonous,' etc., whereby plaintiff became sick. This was, no doubt, regarded by the plaintiff as a material averment; and it was a material averment, one upon which the right of recovery of plaintiff rested; and, unless the evidence fairly tended to establish negligence on the part of the defendants, plaintiff could not recover. But it is said in the argument that innkeepers are *prima facie* liable for losses which happen to the goods of their guests, and, on the same principle, restaurant keepers should be *prima facie* liable for injury resulting from unwholesome food furnished by them. The law is well settled that the keepers of public inns are required to safely keep the property of their guests, and in case such property is lost, the innkeeper can only relieve himself from liability by proving that the loss occurred without any fault on his part, or that the loss occurred through the fault of his guest; and the burden of proof to exonerate the innkeeper is upon himself; for the reason that the law, in the first instance, will attribute the loss to his default. * * *

"As respects the goods of a guest, which he takes with him when he stops at an inn, the innkeeper is practically an insurer; and, where an action is brought to recover for goods lost, the guest is only required to show the existence of the relation to innkeeper and guest, and the loss, to authorize a recovery. But as to food served at a restaurant, such as oysters, ice cream, and the like, we are not aware that a similar rule establishing liability ever existed. There is no similarity between the two cases, and the principle that governs one does not apply to the other. If a person keeping a public restaurant fails to exercise ordinary care in furnishing food to his patrons, and damages result, he would be liable, if his business be conducted in a careless or negligent manner, and through such negligence a patron is injured. But, where an action is brought to recover damages, the burden is upon the person bringing the action to establish carelessness or negligence.

"Plaintiff claims that, having proved that she ate the oyster broth at the defendant's restaurant, and in consequence became sick, her case is made out, or at least the burden of proof is shifted on the defendants. If this rule was adopted the plaintiff would be relieved from proving the most important element of her declaration, the negligence of the defendants, which is really the foundation of the action. This would, in effect, make the restaurant keeper an insurer. Such a rule is not correct in principle, nor has it been sustained, so far as we are advised, by any respectable authority. As the plaintiff failed to introduce any evidence tending to prove the most material averment of her declaration, the instruction of the court to find for the defendants was correct."

The remedy of the plaintiff seems to be to proceed against the packer of canned goods, it being quite generally held that a packer or manufacturer is liable for injurious results arising from eating articles of food prepared for human consumption, which prove to be impure or unwholesome.[9]

In Trafton v. Davis, which was a suit to compel a canning company to accept for packing a quantity of corn contracted for, but which was frostbitten before being delivered to the cannery, the court said:

"Dealers who sell to their customers a high grade of goods, packed and inspected in accordance with approved methods, and expressly guaranteed under the Pure Food Act, with no defect discoverable by the exercise of the sense of sight, smell, or taste, and hotel keepers and victualers who furnish such goods to their guests for food, are not liable for injuries to such customers or guests caused by eating such food, though it is in fact found to be poisonous. Bigelow v. Maine Central R. R. Co., 110 Me. 105, 85 Atl. 396. Whatever liability for damages there may be in such a case must rest solely upon the packer who cans the goods."

In Tomlinson v. Armour & Co.[10] the defendant was engaged in the business of putting up in tin cans or vessels and selling meats for domestic use, one of which cans plaintiff purchased from a dealer and, after eating a portion of its contents be-

(9) Trafton v. Davis, 110 Me. 318, 86 Atl. 179; Haley v. Swift, 152 Wis. 570, 140 N. W. 292; Wilson v. J. G. & B. S. Ferguson Co., 214 Mass. 265, 101 N. E. 381.

(10) 75 N. J. L. 748, 70 Atl. 314.

came sick with ptomaine poison. A judgment for plaintiff was reversed, Mr. Justice Pitney saying in the course of his opinion:

"Coming, then, to consider the facts of the present case as averred in the declaration, and dealing with them, irrespective of the presence or absence of contractual obligations arising out of the dealings between manufacturer and retailer and between retailer and consumer, the question is whether the manufacturer is under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer, to exercise care that the goods which he puts into cans and sells to retail dealers, to the end that such dealers may sell the same to customers and patrons as food, are wholesome and fit for food, and not tainted with poison. Canned goods are, at the present day, in such common use that we may judicially recognize that the contents are sealed up, not open to the inspection or test, either of the retailer or of the customer, until they are opened for use; and not then susceptible to practical test, except the test of eating. When the manufacturer puts the goods upon the market in this form for sale and consumption he, in effect, represents to each purchaser that the contents of the can are suited to the purpose for which it is sold, the same as if an express representation to that effect were imprinted upon a label. Under these circumstances, the fundamental condition upon which the common-law doctrine of *caveat emptor* is based—that the buyer should 'look out for himself'—is conspicuously absent; for he has no opportunity to look out for himself. And when he thus buys and eats the contents of the package, relying upon the assurance of the manufacturer that they are fit to be eaten, it seems to us to result from general and fundamental principles that he has a right to insist that the manufacturer shall at least exercise care that they are so fit, and not unwholesome and poisonous.

* * * * * *

"Upon both reason and authority, we are clearly of the opinion—that the declaration before us sets up a good cause of action. The fact that the defendant was the manufacturer, presumably having knowledge, or opportunity for knowledge, of the contents of the cans and of the process of manufacture; that it put the goods upon the market for sale by dealers to consumers, under circumstances such that neither dealer or consumer had opportunity for knowledge of the contents; the fact that the goods were thus manufactured and marketed under circumstances that imported a representation to the intending purchasers that they were fit for food and beneficial to the human body; that, in the ordinary course of business there was a probability (it being, indeed, the very purpose of the defendant) that the goods should be purchased, and used by parties purchasing, in reliance upon the representation; and that the defendant negligently prepared the food so that it was unwholesome and unfit to be eaten, and poisonous to the human body, whereby the plaintiff was injured—make a case that renders that defendant liable for the damages sustained by the plaintiff thereby."

H. O'B. Cooper.

Washington, D. C.

EXPLOSIVES—NEGLIGENCE IN BLASTING.

RAFFERTY v. DAVIS.

Supreme Court of Pennsylvania, March 18, 1918.

103 Atl. 951.

Where the explosion of dynamite threw a rock a short square and a half from the quarry, through plaintiff's window, and injured her, such a violent and unusual result amounted in itself to evidence from which the jury might infer a lack of proper care in the amount of explosives used for the blast.

POTTER, J. This is an appeal from a judgment entered upon a verdict for damages to the plaintiff resulting from the negligence of the defendant in conducting blasting operations in or near a residence district. In the statement of claim it is averred that on September 22, 1915, defendant was the owner and operator of a quarry situated at Dexter Street and Schur's Lane, Manayunk, Philadelphia; that on the same date plaintiff was sitting at the window of her house, which is about one and a half squares from where defendant was operating his quarry; and that, while she was thus seated at the window, a large stone or rock, blown from defendant's premises, crashed through the window and severely and

permanently injured her. The specific negligence averred against defendant was the use of an overcharge of powder, and failure to use reasonable precautions to safeguard the vicinity from flying pieces of rocks. It is contended upon the part of appellant that the evidence as to such negligence as was set forth in the statement was not sufficient to justify its submission to the jury. It appears from the record, however, that there was testimony tending to show that the blast was so violent that a witness distant some 150 feet from the point of the explosion, was thrown off his feet by the shock, and another witness, half a square away, was almost thrown from the roof of his house where he was working; also that a shower of stone and dirt fell on the houses and in the streets, over an area extending a short square and a half from the quarry. If this evidence was credited, it was sufficient to justify an inference by the jury that the blast was the result of an overcharge, and to warrant a finding of negligence upon that ground. Defendant evidently anticipated the possibility of danger from the blast, for the witness, Prince, who was in charge of the work, and who set off the blast, testified that he sent out workmen with red flags to warn people to keep off the streets in the vicinity until the explosion was over.

We have several times said that extreme care must be observed in the use of so dangerous a substance as dynamite. In Sowers v. McManus, 214 Pa. 244, 245, 63 Atl. 601, the present Chief Justice said that the general rule in cases of the explosion of dynamite, where third parties having no relation to the person having it in possession are injured, is that the highest degree of care must be exercised. The same statement of principle was approved in Derry Coal & Coke Co. v. Kerbaugh, 222 Pa. 448, 71 Atl. 915, and in Forster v. Rogers Bros. 247 Pa. 54, 93 Atl. 26. In Zahniser v. Penna. Torpedo Co., 190 Pa. 350, 353, 42 Atl. 707, 708, Mr. Justice Mitchell said:

"In cases where the duty is not absolute, like that of a common carrier to exercise the highest care and skill in regard to the safety of a passenger who has committed himself to its charge, but arises in the ordinary course of business, it is essential that it shall appear that the transaction in which the accident occurred was in the exclusive management of the defendant, and all the elements of the occurrence within his control, and that the result was so far out of the usual course that there is no fair inference that it could have been produced by any other cause than negligence. If there is any other cause apparent to which the injury may with equal fairness be attributed, the inference of negligence cannot be drawn."

In the case at bar the transaction in which the accident occurred was in the exclusive management of defendant, all the elements of the occurrence were within his control, the result was so far out of the usual course that no fair inference that it could have been produced by any other cause than negligence, and no other cause is apparent to which the injury may with equal fairness be attributed. The case seems, therefore, to fall directly within the rule as stated.

In the last case cited Mr. Justice Mitchell also said (190 Pa. 353, 42 Atl. 708):

"The accurate statement of the law is not that negligence is presumed, but that the circumstances amount to evidence from which it may be inferred by the jury."

In the case at bar we think the circumstancs did amount to such evidence. It certainly was not necessary to put in so powerful a blast as to produce the result which followed in this case. It is common knowledge that in the use of explosives in blasting they can be so regulated as to produce the desired results within a very reasonable degree of accuracy. Such a violent and unusual result as that shown here amounts in itself to evidence from which the jury might well have inferred a lack of proper care in the amount of explosive used for the blast.

Another element which appears upon the surface of the case arises out of the duty which rests upon one conducting blasting operations upon his own property to do so in such a manner as not to injure others in person or property. If he inflicts such injury, it is a trespass for which he may be held responsible even if not shown to be negligent. This principle illustrated in Mulchanock v. Whitehall Cement Mfg. Co., 253 Pa. 262, 264, 98 Atl. 554, L. R. A. 1917 A, 1015, where we said:

"It is clear that the evidence here disclosed a case of aggravated wrong to the rights and property of the plaintiff. If the defendant so conducted its work of blasting upon its premises as to cause damages to the adjoining property by casting rocks thereon, this amounted to a direct trespass on the premises injured, for which the liability of the defendant was absolute, and for which it is bound to respond in damages without regard to the question of negligence."

A statement of the same principle as reflected in the text-books, appears in 11 Ruling Case Law (1916) § 673, where it is said:

"The decided weight of authority supports the view that where one explodes blasts on his

own land and thereby throws rocks, earth or debris on the premises of his neighbor, he commits a trespass and is answerable for the damage caused, irrespective of whether the blasting is negligently done. This rule is not restricted to liability for injury to the land or improvements of an adjoining owner. As the safety of persons is more sacred than the safety of property, the liability extends to personal injuries inflicted on such adjoining owner, or on anyone who is lawfully on his premises. The rule extends, moreover, to injuries inflicted on persons traveling on a public highway."

Another statement of the rule is found in 1 Thompson on Negligence, § 764, p. 704, where it is said:

"Where the work of blasting is done in a situation where it is necessarily dangerous to the public, as in a thickly settled portion of a city, whereby a person is killed or injured, damages are recoverable for such injury or death without proof of negligence, and notwithstanding proof that the person or corporation so firing the blast employed skillful and experienced men and exercised the highest degree of care. The reason is that in such a case the work itself is so inherently dangerous that the doing of it, no matter how carefully, is of itself negligence, so that no amount of care in doing the negligent act will excuse the actor from the responsibility of the consequences which grow from it."

The assignments are all dismissed, and the judgment is affirmed.

NOTE.—*Blasting Amounting to Trespass on Neighboring Property.*—In Mulchanock v. Whitehall Cement Mfg. Co., 253 Pa. 262, 98 Atl. 554, L. R. A. 1917A 1015, it is held that one casting rock upon his neighbor's property is bound in damages for injury caused thereby, independently of the question of negligence. The court says: "If the defendant so conducted its work of blasting upon its premises as to cause damages to the adjoining property by casting rocks thereupon, this amounted to a direct trespass upon the premises injured, for which the liability of defendant was absolute, and for which it is bound to respond in damages, without regard to the question of negligence."

And in Stancourt Laundry Co. v. Lamura, 147 N. Y. Supp. 895, a complaint alleging negligence in conducting blasting operations, so that large pieces of stone were forcibly thrown on plaintiff's premises, causing injury, such allegation of negligence is to be regarded as surplusage.

But this general rule is qualified as to a plaintiff where by contract or by law one acquires an easement over plaintiff's land, which either expressly or impliedly authorizes blasting, and in such a case there must be negligence of a proximate nature resulting in injury. Ex parte Birmingham Realty Co., 183 Atl. 444, 63 So. 67. Speaking of the general rule of liability, the court said: "It is qualified by the principle that, where the defendant has by law or contract acquired an easement as against the plaintiff's premises, which expressly or impliedly authorizes the operation of blasting either directly or as a reasonably necessary incident to some other lawful purpose, liability arises only as a result of some proximate negligence on the part of the defendant."

Thus in Wilkins v. Mason Consol. State Co., 96 Me. 285, 52 Atl. 765, it appears that plaintiff conveyed premises to defendant with knowledge that they were used for a quarry. The court said: "The maxim *sic utere tuo ut alienum non laedas* expresses not only the law, but the elements of good neighborhood and mutual right. The fact that plaintiff granted the quarry, to be used as a quarry, cannot be regarded as conferring a right upon defendant to make an illegal use of the quarry to his detriment nor as a release of damages resulting therefrom. With suitable precautions, blasting can be done in the quarry, without throwing rocks upon plaintiff's premises. Such noise as necessarily results from blasting may be supposed to have been at the time of the grant an element in making the price. But the unnecessary throwing of rocks or other debris upon plaintiff's land cannot be so regarded. The plaintiff might well rely upon the assumption that defendant would conduct his operations in compliance with law and with that regard to his rights which the law imposes."

In Gordon v. Elmore, 71 W. Va. 195, 76 S. E. 344, the facts show that a railroad contractor was doing blasting on a right of way and cast rocks on plaintiff's land, but failed to remove them. The court held that if the work of construction was prudently and carefully done, defendant would be saved from damages, but, nevertheless, if he allowed rock cast upon plaintiff's land to remain on the land to plaintiff's injury, he could recover therefor.

In Spencer v. Gainesville, 140 Ga. 632, 79 S. E. 543, the grantee from plaintiff of a quarry was held not liable for injury from blasting where the deed recited that the land might be used in all necessary ways in blasting, crushing and removing stone and rock thereon. "The mere fact that the stones fell upon plaintiff's adjacent land and injured his property would not render defendant liable in trespass for the injury."

Where there are no elements of estoppel against a plaintiff, who sought injunction against the continuance of blasting, though no negligence in the work was claimed, it was said: "The law does not consider that a man has the free enjoyment of his home, when large rocks are frequently hurled upon his housetop, in his yard and upon his highway, simply because he has thus far escaped physical hurt. Nor does it help matters, that respondents give a warning signal before every blast, as the law does not require that it is incumbent upon a man to have to seek shelter for himself and family from a wrongful bombardment of his premises, although the aggressive party gives timely notice before committing the dangerous act." Central Iron & Coal Co. v. Vandenhenk, 147 Ala. 546, 41 So. 145, 6 L. R. A. (N. S.) 570, 119 Am. St. R. 102, 11 Ann. Cas. 346.

As showing that blasting operations, though necessary and done without negligence, may give adjoining land-owner a cause of action, see Gossett v. So. Ry. Co., 115 Tenn. 376, 112 Am. St. 846, 89 S. W. 737.

In Laryhome v. Turman, 141 Ky. 809, 133 S. W. 1008, 34 L. R. A. (N. S.) 211, it was held, that

casting by blasting necessary in construction of a railroad, of *debris* on remaining land out of which a right way has been taken, makes the railroad liable for trespass, wholly regardless of the skill with which it prosecutes the work. It was said: "It is a well-known fact that blasting can be done in such small quantities and with such means of protection as to confine the *debris* to a very small space. In this way blasting can be done without creating a nuisance."

It is perceived that, though one has the right to conduct operations on his own land, that he must always consider that in pursuing his purposes, lawful in themselves, he must not directly infringe on the rights of another, equally as sacred as are his own. C.

CORRESPONDENCE.

COKE AND BLACKSTONE AS "FATHERS OF THE COMMON LAW."

Editor, Central Law Journal:—

Judge Walter Clark, of Raleigh, North Carolina, has recently sent out a little pamphlet, with his compliments, entitled "Coke, Blackstone, and the Common Law," in which there are some pretty severe strictures upon the old "horn books," and the "fathers of the law"—or at least for a century or more looked upon as such, treating one as a fawning theorist who never could win his way to a practice, and the other as a "pervert" who deliberately made the law to suit his own notions, whims, and spleen. Judge Clark's stricture on Lord Coke recalls the remarks of Mr. Justice Darling in the recent Sir Roger Casement Case (King v. Casement, 1 K. B. 98, Ann. Cas. 1917 D, 468, 478), a trial for high treason, in which Mr. Serjant Sullivan appeared for the prisoner, and insisted that the court should cast aside and refuse to consider the authority of Sir Matthew Hale, Mr. Serjant Hawkins and Lord Coke, contending that the court should not follow Lord Coke's opinion or consider him as authority because Stephens, in his Commentaries on the Common Law, and other writers elsewhere, have spoken lightly of the learning and authority of Lord Coke. The English judge, in denying this request, and founding his decision upon the authority of the three ancient writers, says, among other things: "It may have been so. Of course they have all the advantage. They are his (Lord Coke's) successors. If Lord Coke were in a position to answer them, it may be that they would regret that they had engaged in the argument with him; but although Stephens and others have perhaps flouted the opinion of Lord Coke, he has been recognized as a great authority in these courts for centuries, and nowhere more than in the passage I am about to read," and read from Garland v. Jeyll (2 Bing. 296, 9 Eng. C. L. 412), a passage warmly commending Lord Coke's authority and learning.

HARRY M. HANSON.

Pasadena, Cal.

HUMOR OF THE LAW.

President Neilson of Smith College, whose humor is much enjoyed by the young women of that institution, has recently told of an amusing experience which he had when returning home from a speech-making trip. While in the observation car he and a "drummer" were trying to pass away the time with a chat. Just as the train was nearing the president's station, the "drummer," in a final burst of confidence, said: "My line's skirts; what's yours?" As he picked up his luggage and hurried out, Dr. Neilson called back: "So's mine."—*Christian Science Monitor.*

When lawyers are defeated in the Supreme Court by that tribunal taking cognizance of the maxim that "it is the letter of the law that killeth, but the spirit that maketh alive," they sometimes elevate the tips of their proboscides and sneer at the decision against them as "judge-made law." It is not clear that judge-made law may not sometimes promote substantial justice more than statutes enacted by legislatures. There was a case decided by a justice of the Supreme Court of California at an early day in which the rights of a drunken man were clearly and sensibly defined. The plaintiff, while inebriated, had stepped upon a rotten plank in the sidewalk, which gave way under him, and as a result his leg was broken. He sued the city, and the answer of the municipality was that, as the plaintiff was intoxicated at the time of the accident, he was guilty of contributory negligence and therefore not entitled to recover. This plea proved unavailing with the court and jury, and he was accorded a judgment for damages. The city appealed, but the Supreme Court affirmed the judgment, saying: "A drunken man has as good a right to perfect sidewalk as a sober man, and he needs one a good deal more."—*Case and Comment.*

WEEKLY DIGEST

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1. **Alteration of Instruments** — Presumption. —A note reading "with interest payable annually at twelve—(10)—per cent" will be presumed to bear the legal non-contractual rate of interest which under C. L. 1913, § 1913, is 7 per cent.—Merchants' Nat. Bank of Wimbledon v. Bastrup, N. D., 168 N. W. 42.

2. **Attachment** — Non-residence. — Where a writ of attachment is levied upon the property of a non-resident defendant, but no service is had on him, the defendant will not be heard, on his plea to the jurisdiction of the court, to allege non-ownership of the property levied upon, since, if he has no interest in the property, he cannot be injured by the seizure thereof.—Weaver Grocery Co. v. Cain Milling Co., Miss., 78 So. 769.

3. **Bankruptcy** — Claims. — Where brewing company located in Illinois gave to bankrupt exclusive right to sell its beer at wholesale, same to be delivered f. o. b., at Omaha, Neb., it was entitled to have allowed claims against bankrupt, based on sales made under contract, though it was not licensed in Nebraska to sell intoxicating liquors.—Thompson Belden & Co. v. Leisy Brewing Co., U. S. C. C. A., 249 Fed. 462.

4.——Exemption.—Under Bankruptcy Act, § 70a, a life policy payable to the wife of bankrupt, unless exempt by state statute, passes to the trustee, where bankrupt, without consent of his wife, had right, at any time, to substitute another beneficiary.—In re Jones, U. S. D. C., 249 Fed. 487.

5.——Injunction.—Where bankrupt, who concealed existence of life insurance policies and was discharged, died, and his executor sued in state court on policies, held, that trustee, who had not been discharged, and who had sued thereon in federal court, was not entitled to enjoin action by executor in state court; case not falling within Bankruptcy Act, § 11.—Doolittle v. Mutual Life Ins. Co. of New York, U. S. D. C., 249 Fed. 491.

6.——Insurance.—In view of limitation imposed by Const. Md. art. 3, § 44, Code Pub. Gen. Laws Md. 1904, exempting from execution all moneys arising from insurance must be construed as entitling bankrupt claiming as exempt life policy having large surrender value to exemption only to amount of $500, amount fixed by Constitution.—In re Jones, U. S. D. C., 249 Fed. 487.

7.——Party in Interest.—Where in course of investigation of bankrupt's affairs under Bankruptcy Act, § 21a, testimony of a large number of witnesses was taken stenographically before referee, bankrupt in view of sections 39a(3), 47a(5), and 49a, as well as a local bankruptcy rule, is entitled, on paying charge fixed, to stenographic copy of such testimony, for bankrupt must be deemed a party in interest.—Petition of Moulthrop, U. S. C. C. A., 249 Fed. 468.

8.——Pleading and Practice.—An involuntary petition in bankruptcy against a partnership held sufficient, where it was answered without objection thereto, although it did not distinctly allege that the partners individually were insolvent.—Houghton Wool Co. v. Morris, U. S. C. C. A., 249 Fed. 434.

9.——Proof of Claims.—One proving his claim in bankruptcy court, may sue for same claim in state court against bankrupt after the filing of an application for discharge, in order to obtain an attachment lien on defendant's after-acquired and garnished property. — Roth v. Pechin, Pa., 103 Atl. 894.

10.——Trustee.—Where a trustee in bankruptcy was not a party to proceedings of a creditor to foreclose his fourth mortgage, under which sale was had resulting in a deficiency judgment, the deficiency judgment did not constitute a liquidation of the claim under the mortgage, within Bankruptcy Act, § 57h, so as to be provable.—In re Soltmann, U. S. C. C. A., 249 Fed. 455.

11.——Trustee.—Under Bankruptcy Act, § 70, a trustee, when elected, is by operation of law vested with bankrupt's title as of date of adjudication, and where trustee was not made a party to a suit to foreclose a mortgage on the bankrupt's property begun after bankruptcy, but before trustee's election, equity of redemption, which passed to him, was not foreclosed by the judgment.—In re Solomann, U. S. C. C. A., 249 Fed. 455.

12. **Banks and Banking** — Evidence. — Form of checks on national bank, drawn by treasurer of association to his own order and order of trust company, with which he deposited them to his own individual credit, and fact of deposit to such credit, held insufficient to warrant finding that trust company had reason to believe treasurer was acting dishonestly.—Kendall v. Fidelity Trust Co., Mass., 119 N. E. 861.

13.——Forgery.—Where one, whose only authority was to stamp checks for deposit, stamped a check with the same stamp, added his name, and cashed it with B., indorsement was not a forgery, and bank cashing check for B. was not liable.—McCabe Hanger Mfg. Co. v. Chelsea Exch. Bank, N. Y., 170 N. Y. S. 759.

14. **Bills and Notes**—Bona Fide Purchaser.—Purchaser of assets of pledgor bank, to which plaintiff transmitted for collection notes pledged by such bank, held not entitled as a bona fide purchaser to notes which had been indorsed in blank as against plaintiff, for due diligence would have disclosed plaintiff's ownership.—Stockyards Nat. Bank of St. Paul, Minn., v. First Nat. Bank of Towner, N. D., U. S. C. C. A., 249 Fed. 421.

15.——Diligence. — Holder of note presented and dishonored may rely on notary's diligence in inquiring for address of party obligated by note, and is not affected by want of diligence in officers of bank where note was payable and of whom inquiry was made.—Second Nat. Bank of Hoboken v. Smith, N. J., 103 Atl. 862.

16.——Estoppel. — Accommodation maker of note containing words "value received" was not estopped to deny consideration; such words being a mere admission.—Kennedy v. Heyman, N. Y., 170 N. Y. S. 828.

17.——Notary. — Where a notary was not shown to have a personal interest in transaction when the notarial act was passed, the

fact that negotiable notes were secured by an act of mortgage, passed before him as notary public, was no reason why he could not afterwards purchase the notes in good faith. — Dreyfous v. Papalia, La., 78 So. 843.

18. **Brokers** — Revocation of Authority. — If owner in good faith had revoked the brokers' authority before they had procured a purchaser ready, willing, and able to purchase, it did not make any difference upon what ground he placed his refusal to complete the sale, so far as the brokers' right to compensation was concerned.—Schiffin v. Smith, Ark., 203 S. W. 849.

19. **Carriers of Goods** — Common Law. — Whether consignee of interstate freight is or has become party to contract of transportation must be determined by general principles of common law.—New York Cent. & H. R. R. Co. v. York & Whitney Co., Mass., 119 N. E. 855.

20.——Rates.—Where agent of interstate carrier, accepting goods under bill of lading requiring payment of freight by the owner or consignee, inadvertently charged a lower rate than that on file with the Interstate Commerce Commission, the carrier could recover the amount of the deficit.—Western Ry. of Alabama v. Collins, Ala., 78 So. 833.

21.——Rates.—Where railroad company operates two lines between same point, and freight rate over one is less than rate over the other, it is ordinarily duty of carrier to ship by cheaper route; but duty is not absolute, carrier being bound to consider, not only shipper's interest, but its own, and that of public, and if, all things considered, it would be unreasonable to ship by cheaper route, carrier is not required to do so.—Northern Pac. Ry. Co. v. Solum, U. S. S. C., 38 S. Ct. 550.

22.——Rates. — Where trunk line companies owned all of the stock and controlled a railway company whose entire mileage was part of their terminal facilities, they cannot, on the theory of its separate corporate entity, impose on shippers and industries reached by such company's line, charges in excess of their ordinary rates to the terminal point.—Chicago, M. & St. P. Ry. Co. v. Minneapolis Civic & Commerce Ass'n, U. S. S. C., 38 S. Ct. 553.

23.——Res Judicata. — Shipper aggrieved by loss of freight in transit may sue carrier in separate actions for amount claimed for loss and for penalty prescribed by Civ. Code 1912, § 2573, for failure to pay claim within 30 days, though trial of action for penalty must accompany or follow trial of that for claim.—Sauls-Baker Co. v. Atlantic Coast Line R. Co., S. C., 96 S. E. 118.

24. **Carriers of Passengers**—Alighting from Car.—A railroad is answerable for negligence of Pullman porter in not placing step for a passenger to alight resulting in personal injury, though porter was not its employe, in absence of any showing that Pullman car was not under its management, as passenger may assume that whole train is under one management.—Rogers v. Philadelphia R. Ry. Co., Pa., 103 Atl. 873.

25.——Collision.—Where plaintiffs took passage on defendant suburban electric railway's car for continuous passage on the same car to a point in another state, knowing no other carrier than defendant, defendant was liable for collision damages, although fare was collected in six installments of nickel each, and collision occurred in fifth fare zone, over state line, on tracks belonging to another company on which defendant operated under operating agreement, and although defendant had no charter to operate outside state.—Simpson v. Southern Pennsylvania Traction Co., Pa., 103 Atl. 884.

26. **Chattel Mortgages**—Acceleration of Debt. —Where a mortgage provided that upon default in payment of interest, the entire debt should mature at option of mortgagee. failure to pay interest when due gave mortgagee right to declare entire amount due, and where mortgage was foreclosed upon default in payment thereof, the payment of the overdue interest before foreclosure did not make foreclosure premature. —Swan v. Jones, Ore., 173 Pac. 249.

27.——Statutory Construction.—Under Michigan statute (How. Ann. St. 1912, § 11407), as construed by Michigan courts, failure to file a chattel mortgage, where possession of property is not transferred, renders it void as to mortgagor's creditors subsequent to mortgage and before statute is complied with, and they may attack mortgage, though they acquire no lien during time statute was not complied with. —Goldberg v. Brule Timber Co., Minn., 168 N. W. 22.

28. **Commerce**—Employment of Children. — Act Sept. 1, 1916, prohibiting transportation in interstate commerce of the products of mines of factories in which within 30 days prior to removal of children under 14 were employed, or children between 14 and 16 were employed more than 8 hours per day and 6 days a week is invalid, and cannot be sustained as a regulation of interstate commerce. — Hammer v. Dagenhart, U. S. S. C., 38 S. Ct. 529.

29. **Constitutional Law**—Due Process of Law. —The owner of realty injured by the construction and operation of an elevated railroad was not deprived of his property without due process of law in violation of the Fourteenth Amendment because benefits resulting from the increased travel were considered in determining whether the premises had been damaged, though other neighboring lands were similarly benefited.—McCoy v. Union Elevated R. Co., U. S. S. C., 38 S. Ct. 504.

30.——Due Process of Law.—Where city, after telegraph lines located in its streets had been conveyed to defendant, recovered judgment against grantor company for license fees for use of streets, and defendant was in no way party. decision of state court that defendant was concluded by such judgment was erroneous, depriving it of its property without due process of law, guaranteed by the Fourteenth Amendment.—Postal Telegraph Cable Co. v. City of Newport, Ky., U. S. S. C., 38 S. Ct. 566.

31.——Estoppel.—Contention that Acts 1898, c. 49 (Ky. St. § 4679c), authorizing condemnation by telegraph companies of easements over railroad rights of way, is invalid because of provision that no notice need be given any mortgagee, cannot be urged by railroad company, for one not injured cannot question constitutionality of law.—Louisville & N. R. Co. v. Western Union Telegraph Co., U. S. C. C. A., 249 Fed. 385.

32.——Income Tax.—The levy and assessment under Laws Wis. 1911, c. 658, of a general income tax upon the net income of a Wisconsin corporation derived from transactions in interstate commerce, is not such a direct burden on interstate commerce as to contravene the commerce clause of Const. art. 1, § 8.—United States Glue Co. v. Town of Oak Creek, U. S. S. C., 38 S. Ct. 499.

33.——Obligation of Contracts.—Const. art. 1, § 10, declaring that no state shall pass any law impairing the obligation of contracts, applies only to legislative. and not judicial, action.— McCoy v. Union Elevated R. Co., U. S. S. C., 38 S. Ct. 504.

34.—Taxation.—Intentional systematic undervaluation by state officials of other taxable property in same class contravenes constitutional right of one assessed upon full value of his property.—Sunday Lake Iron Co. v. Wakefield Tp., U. S. S. C., 38 S. Ct. 495.

35. **Contracts**—Abandonment.—Where plaintiff abandoned his contract to furnish labor and material in alteration of building for a certain sum, and owner accepted work and completed it at his own expense, plaintiff might recover for labor, etc., according to contract price in proportion that they bore to completed work, less damages from abandonment. — Eckles v. Luce, Okla., 173 Pac. 219.

36.——Police Power.—The court will not require performance nor award damages for breach of a contract to hold a baby show, where epidemic of infantile paralysis renders the show highly dangerous to public health, and therefore contrary to public policy.—Hanford v. Connecticut Fair Ass'n, Conn., 103 Atl. 838.

37. **Corporations**—Assessment Against Stockholders.—Where corporate stock was issued without subscription, the stockholders are liable to assessment, just as if they had been subscribers.—In re Phoenix Hardware Co., U. S. C. C. A., 249 Fed. 410.

38.——Foreclosure.—In a suit to foreclose a corporate trust deed for default in interest, it is no defense that the trustee, acting with the corporation's directors, so manipulated the corporate affairs that the corporation was unable to pay the interest.—Title Ins. & Trust Co. v. Northwestern Long-Distance Telephone Co., Ore., 173 Pac. 251.

39.——Injunction.—Statute granting charter to power company cannot be attacked in suit for injunction against purchase of land by another power company on ground that 30 days' notice required by Const. art. 2, § 12, has not been given.—Carolina Tennessee Power Co. v. Hiawassee River Power Co., N. C., 95 S. E. 99.

40.——Lien on Stock.—In action against a corporation to fix a lien on stock standing in the name of one who had put it up as collateral, the corporation claiming a prior lien, whether corporation was chargeable with a limited purpose for which the stockholder had been transferred the stock by another was a matter in which complainant could have no interest.—Mobile Towing & Wrecking Co. v. First Nat. Bank, Ala., 78 So. 797.

41. **Death**—Federal Employers' Liability Act.—Federal Employers' Liability Act makes the widow sole beneficiary when there is no child, and only in the absence of both may parents be considered; so proof of pecuniary loss by mother on account of death of her son will not support a recovery, where the son left surviving widow, though he and she had been living apart.—New Orleans & N. E. R. Co. v. Harris, U. S. S. C., 38 S. Ct. 535.

42. **Discovery**—Books and Accounts.—Leave to examine defendant's books in order to ascertain the exact amount due plaintiff, that the complaint may be framed accordingly, will not be granted.—Zurich General Acc. & Liability Ins. Co. v. Union Ferry Co. of New York and Brooklyn, N. Y., 170 N. Y. S. 758.

43. **Divorce** — Alimony. — A defendant, adjudged to pay alimony pendente lite, cannot complain of no sufficient hearing thereon, where the court had jurisdiction, and he had notice and appeared with counsel in open court, and the award was based largely upon his own testimony, covering 30 pages of the record.—Westphal v. Westphal, Md., 103 Atl. 846.

44. **Electricity**—Res Ipsa Loquitur.—In an action against a telephone company for damages for the burning of plaintiff's property in which the company's wires were located, the rule of ipsa loquitur does not relieve plaintiff from the burden of showing negligence.—Paine v. Cumberland Telephone & Telegraph Co., U. S. C. C. A., 249 Fed. 477.

45. **Eminent Domain** — Condemnation. — An electric company which is a riparian proprietor does not for that reason have power of eminent domain, since such power can only be acquired by legislative grant.—Carolina Tennessee Power Co. v. Hiawassee River Power Co., N. C., 96 S. E. 99.

46.——Easement.—As Acts 1898, c. 49 (Ky. St. § 4679c), authorizing telegraph companies to condemn easements over railroad rights of way, allows judgment only for so much of land as may be necessary, some measure or degree of necessity must exist before right of condemnation matures.—Louisville & N. R. Co. v. Western Union Telegraph Co., U. S. C. C. A., 249 Fed. 385.

47.——Water Rights. — Electrical company which is riparian owner on stream, in defense to power company's action to condemn water rights therein held not to be heard to urge that its land and rights cannot be taken by power company in aid of its purpose to supply water to city.—State v. Superior Court for Pacific County, Wash., 173 Pac. 192.

48. **Estoppel** — Parties to Action. — Where bill for injunction was against E. E. Y. Turpentine Company and E. E. Y., and the final decree was rendered against them both, the company being a partnership of which E. E. Y. was a member, and the writ was served only on E. E. Y., and in obedience thereto business of the company was suspended, the plaintiff in such suit is estopped in an action for damages for wrongful injunction from saying the company was not enjoined.—E. E. Yarbrough Turpentine Co. v. Taylor, Ala., 78 So. 812.

49. **Exemptions**—Benefit Society.—Life Policy payable to wife of insured, but reserving in him power to change beneficiary without wife's consent, cannot be deemed for benefit of wife, so as to be exempt under Code Pub. Gen. Laws Md. 1904, art. 45, §§ 8, 9, exempting from liability for debts any policy on debtor's life, taken out or assigned by him for sole use of his wife.—In re Jones, U. S. D. C., 249 Fed. 487.

50. **Food**—Intent.—Penal Law, § 435, subd. 4, as added by Laws 1915. c. 233, providing that one who, with intent to defraud, sells or exposes for sale any meat falsely represented to be "kosher," or as having been prepared under orthodox Hebrew religious requirements, is guilty of a misdemeanor, is valid, being within the police powers.—People v. Atlas, N. Y., 170 N. Y. S. 834.

51. **Frauds, Statute of**—Promise to Pay Debt of Another.—Where officer of a corporation told dealer orally to furnish gasoline to the trucks of the corporation and charge it to him and he would pay it, and credit was given him personally, he was liable, although sale slips and bills were made out in the name of the corporation.—S. J. Cordner Co. v. Manevetz, Conn., 103 Atl. 842.

52. **Guaranty**—Notice of Acceptance.—Where the bank before lending money required a guaranty, which the borrower took to defendant for his signature, and the instrument was returned to the bank, defendant was not entitled to notice of acceptance of the guaranty.—Hartford-Aetna Nat. Bank v. Anderson, Conn., 103 Atl. 845.

53. **Habeas Corpus**—Selective Draft Law.—Where registrant under Selective Draft Law is certified into military service, decisions of examining boards as to his physical condition cannot be reviewed on habeas corpus; hence one so certified cannot, where he refused to undergo operation as directed by military authorities for cure of pre-existing trouble, obtain his discharge under habeas corpus.—De Genaro v. Johnson. U. S. D. C., 249 Fed. 504.

54. **Homestead** — Community Property. — Where an undivided one-half of property is community property, and the other half wife's separate property, a wife's homestead declaration impressing her separate property as homestead has effect of impressing homestead characteristic on other half as a homestead selected by wife from community property, in the absence of selection by husband.—In re Ballard, Cal., 173 Pac. 170.

55. **Husband and Wife** — Domicile.—A husband's domicile is the domicile of the wife, and is unchangeable by her except with his acquiescence or consent, or for such misconduct on his part inimical to the union as justifies her in selecting another domicile.—Thompson v. Thompson, N. J., 103 Atl. 856.

56. **Injunction** — Appeal and Error.—Where, pending appeal from order enjoining mortgage foreclosure sale under statutory proceedings in state court, settlement of question involved was effected, appellants cannot, appeal being dismissed, assert any rights for damages or costs on injunction bond.—Clark v. Fairbanks, U. S. C. C. A., 249 Fed. 431.

57. **Insurance** — Benefit Society. — That the wife of member of a fraternal benefit association, who was named as beneficiary, paid assessments out of her separate estate, raises no legal claim which would preclude a change of beneficiaries.—Supreme Council of Royal Arcanum v. Behrend, U. S. S. C., 38 S. Ct. 522.

58.——Collateral Contract.—Where life policy providing for loans on security of policy creates a collateral contract only, and insurer's breach thereof does not repudiate contract of insurance, and when loan value of policy is exhausted, it is no breach to refuse loans until pre-

payment of next due premium.—Harn v. Missouri State Life Ins. Co., Okla., 173 Pac. 214.

59.——Evidence.—In the absence of facts creating estoppel, the statement of insured in his proof of loss, as to the nature of his illness, is prima facie, but not conclusive, proof of the nature of the illness.—Union Mut. Aid Ass'n of Mobile v. Carroway, Ala., 78 So. 792.

60.——Release.—Where insured thought he had practically recovered from injury, and so reported to company, which accepted report and settled according to claim in full, and insured signed a release to that effect, there could be no recovery for future consequences of injury. —General Accident, Fire & Life Assur. Corp. v. Harris, Miss., 78 So. 778.

61. **Larceny**—Consent of Owner.—Under Penal Law, § 1293a, providing that unauthorized use of automobile shall constitute crime of larceny, a chauffeur who uses his employer's automobile without his consent, and contrary to instructions, is guilty of larceny, although car was being driven for purpose of testing it.—Rose v. Balfe, N. Y., 119 N. E. 842.

62. **Malicious Prosecution**—Punitive Damages.—That no legal ground existed for suing out an attachment, that no amount was then due, that plaintiff was not about to fraudulently dispose of its goods, that it was wrongfully and maliciously sued out and without probable cause therefor, were sufficient grounds whereon to base an assessment of the vindictive damages.—Bell v. Seals Piano & Organ Co., Ala., 78 So. 806.

63. **Mandamus**—Remedy.—As an order transferring to the equity side of the District Court a count in a complaint seeking damages for breach of a contract to bequeath a sum certain may be regarded as a denial of the court's jurisdiction over the cause of action, mandamus is a proper remedy to require the court to proceed and give plaintiff her right to a trial at common law.—In re Simons, U. S. S. C., 38 S. Ct. 497.

64. **Master and Servant**—Assumption of Risk. —A servant, acting under special directions and orders of the master and by the master assured of safety, does not, as matter of law, assume the risk of going on a scaffold, though having doubts and misgivings as to the danger. —Wolfe v. Griner, Ind., 119 N. E. 839.

65.——Course of Employment.—An employe, working in a trunk factory, directed by his employer to go to another factory across the street to letter a trunk, who received fatal injuries from slipping on snow and ice while returning, was killed by an accident arising out of his employment, and not from an ordinary street risk.—Redner v. H. C. Faber & Son Co., N. Y., 119 N. E. 842, 223 N. Y. 379.

66.—Evidence.—In action against owner of automobile for death caused by automobile while driven by chauffeur, evidence of ownership of the car and of the fact of employment of the chauffeur by such owner is prima facie evidence of owner's responsibility for accident. —Rose v. Balfe, N. Y., 119 N. E. 842.

67.——Hours of Service Act.—Where telegraph operator employed by defendant, who performed duties for and was subject to orders of second railroad company, which through accounting between two companies made contributions to his salary, was required by second company to remain on duty longer than allowed by Hours of Service act, defendant is liable for penalty prescribed.—United States v. Denver & R. G. R. Co., U. S. C. C. A., 249 Fed. 464.

68.——Implied Authority.—Where owner of automobile directed chauffeur to put the machine in dead storage under instructions not to use it without permission, chauffeur has no implied authority to violate orders, and without owner's knowledge or consent take car out for purpose of testing it, and, such use being unauthorized, owner is not liable for accident resulting therefrom.—Rose v. Balfe, N. Y., 119 N. E. 842.

69.——Independent Contractor.—A foreman, authorized to hire employes, who receives payment by the day and an allowance for every employe hired, and acts under the immediate supervision of a superior, is not an independent contractor.—Nichols v. Harvey Hubbell, Inc., Conn., 103 Atl. 835.

70.——Negligence.—Where a railway negligently failed to furnish a sufficient number of men to lift discarded rails being removed from track to a scrap pile, and the men lifting one end of a rail, being unable because of its weight to handle the rail, dropped their end and injured one of the men at the opposite end, the railway is liable.—Perez v. Union Pac. R. Co., Utah, 173 Pac. 236.

71.——Negligence.—It was negligence on part of master mechanic in attempt to repair gas still to discharge highly inflammable liquid in way to come in contact with furnace fires and to spread to vicinity of open trap, surface of which carried oil and inflammable material.— Hallawell v. Union Oil Co. of California, Cal., 173 Pac. 177.

72.——Safe Appliances.—Where an employe is injured by steel flying from a defective steel maul while attempting to straighten a cant hook by placing it on the maul and striking it with an axe, both axe and maul being improperly used for such purpose, the employer is not negligent in not having cant hook properly repaired, where it had no knowledge that it had been bent.—Ten Mile Lumber Co. v. Garner, Miss., 78 So. 776.

73.——Workmen's Compensation Act.—Under Workmen's Compensation Law, § 15, subd. 3, that claimant has sustained a compound fracture of the leg between the ankle and the knee does not create a presumption that he has lost the use of his foot, section 21 after all not applying, and the burden of establishing such loss being on claimant.—Modra v. Little, N. Y., 119 N. E. 853, 223 N. Y. 452.

74.——Workmen's Compensation Act.—In view of Const. art. 20, § 21, empowering Legislature to provide for settlement of workmen's compensation disputes, anything in this Constitution to the contrary notwithstanding, the Legislature has power to limit review of awards of compensation, and to make them conclusive, as provided in Workmen's Compensation Act, §§ 27, 73, 84, 85.—Thaxter v. Finn, Cal., 173 Pac. 163.

75.——Workmen's Compensation Act.—Under Workmen's Compensation Act, art. 2, §§ 10, 12, as to compensation for total incapacity for work, an employe who lost one eye before entering employment, and thereafter, through accidental injury, lost the sight of his remaining eye, was entitled to compensation for "total incapacity for work."—In re J. & P. Coats (R. I.), Inc., R. I., 103 Atl. 833.

76. **Mechanics' Liens**—Bond by Contractor.— not recover thereon for expenses of conveyancing and title insurance, etc.—Spiese v. Shee. Bond to protect owner against loss by filing mechanics' lien against building to be erected or loss from contractor's failure to complete building was a contract of indemnity, and, where construction was not begun, owner could Pa., 103 Atl. 871.

77.——Material Men.—Tubing at the end of which was attached a knife, used solely as an appliance in perforating the casing of a well, which the contractor retained unimpaired save wear and tear, was not, but rental and transportation of tools used were, "materials or supplies" within St. 1897, p. 201, relating to contractor's bonds on public improvements.— Sherman v. American Surety Co. of New York, Cal., 173 Pac. 161.

78. **Mortgages**—Burden of Proof.—In suit to foreclose mortgage, on issue whether two defendants intended to assume payment of mortgage debts referred to, or were led to do so by connivance of others, such defendants have burden of proof, but, on issue whether by subsequent conduct they waived right to set up defense, so as to estop them, other parties have burden.—Krentzlin v. Barron, S. C., 96 S. E. 115.

79.——Estoppel.—One who accepts a deed subject to a mortgage, and deducts amount secured thereby from purchase price, is, together with his privies, estopped from denying validity of incumbrance.—Moore v. Boise Land & Orchard Co., Limited, Idaho, 173 Pac. 117.

80.——Evidence.—In suit by representatives of deceased assignee of land contract which had been assigned as security, in which plaintiffs sought strict foreclosure against assignor, and assignor pleaded payment of the secured indebtedness and reimbursement of moneys paid by assignee under the land contract, notes described in land contract, which had been paid by assignee to vendor named in land contract, offered in evidence by assignor to show his reimbursement of assignee, were admissible, as against objection they were incompetent under Laws 1913, c. 371, as to testimony as to transactions with deceased person.—Stone v. Leavitt, S. D., 168 N. W. 28.

81.——Foreclosure.—One to whom a land contract payable in installments has been assigned to secure an indebtedness cannot, after making the payments called for by the land contract, have strict foreclosure against the assignor, his right being that of a mortgagee merely and enforceable only by ordinary foreclosure. —Stone v. Leavitt, S. D., 168 N. W. 28.

82. **Municipal Corporations**—Assessment for Taxation.—A railroad right of way cannot be assessed on the basis either of general or special enhancement of its market value, but only for actual benefit to such land for the public uses for which it was acquired, and such assessment may rest upon increased facility of use for railroad purposes.—Erie R. Co. v. City of Passaic, N. J., 103 Atl. 855.

83. **Negligence**—Attractive Nuisance.—Where a minor, who was injured by the explosion of dynamite caps, left upon the grounds of a city detention hospital, through the negligence of the city employes, the city was not liable on any theory of attractive nuisance.—Frost v. City of Topeka, Kan., 173 Pac. 293.

84.——Pedestrian.—A pedestrian who crosses a crowded street at 5 o'clock in the afternoon when traffic is heavy, looking straight ahead without glancing to either side, and is struck by an automobile of which he is oblivious until moment of collision, is negligent.—Mayer v. Anderson, Cal., 173 Pac. 174.

85. **Physician and Surgeon** — Negligence. — Physician attending child suffering from scarlet fever is liable for damage resulting from his failure to keep informed as to condition of child and progress of disease, where he made no effort to inform himself thereof.—Tadlock v. Lloyd, Cal., 173 Pac. 200.

86. **Principal and Agent** — Evidence.—Where manager of manila department of plaintiff's paper business procured agency to sell product of bag company, which wished to avail itself of manager's experience and ability, such agency became part of plaintiff's business, which manager if considered an employe, could not filch away on severing his connection with firm.— Lindsay v. Swift, Mass., 119 N. E. 787.

87. **Railroads** — Negligence.—Backing switch engine without light or lookout, in the absence of wantonness, will not make railroad liable to one negligently running velocipede car after dark, contrary to orders, and on track for trains going in opposite direction.—Crosman v. Southern Pac. Co., Nev., 173 Pac. 223.

88. **Reformation of Instruments** — Intent. — Code Civ. Proc. Philippine Islands, § 285, permitting to be introduced, in case of written contracts, evidence of terms of agreement other than contents of writing, where a mistake or imperfection of writing, or its failure to express true intent of parties, is put in issue by pleadings, warrants relief where the mutual mistake was one of law as to the legal interpretation of the contract.—Philippine Sugar Estates Development Co. v. Government of Philippine Islands, U. S. S. C., 38 S. Ct. 573.

89. **Sales** — Contract. — Where, through telegraphic correspondence, individual acting under purported name bought linseed oil in large quantities for future delivery, and seller, though diligent in making inquiry, acted under mistaken belief that buyer was corporation, there was no meeting of minds, and seller, having been diligent, was entitled to rescind contract. —Fay v. Hill, U. S. C. C. A., 249 Fed. 415.

90. **Seamen** — Negligence. — As a shipowner under the maritime law is liable to a member of the crew injured at sea by reason of another member's negligence, regardless of their relation, Seamen's Act, § 20, declaring that seamen having command shall not be held fellow servants with those under their authority, does not, where a seaman was injured as a result of an alleged negligent order of the master, warrant recovery according to common-law rules of liability, the section disclosing no intention to impose such rules of liability on shipowners.— Chelentis v. Luckenback S. S. Co., U. S. S. C., 38 S. Ct. 501.

91. **Taxation** — Tax Title.—The relationship of husband and wife is so intimate and confidential that a husband cannot acquire a valid and independent tax title to his wife's real estate by a purchase thereof at a tax sale.— Croner v. Keefer, Kan., 173 Pac. 282.

92. **Time** — Sunday. — Summons issued and made returnable on a Sunday or a legal holiday does not limit time in which defendant may plead, as it is returnable on the day stated, and effect of statute is to give to return upon next business day the same validity as if made on designated return day.—Harn v. Missouri State Life Ins. Co., Okla., 173 Pac. 214.

93. **Vendor and Purchaser** — Receivership. — Where purchaser rescinds and sues vendor for money paid and for value of improvements made, vendor by interposing counterclaim for rent, thus recognizing purchaser as tenant, assents to such rescission, and terminates contract.—Woodard v. Williamette Valley Irrigated Land Co., Ore., 173 Pac. 262.

94. **Warehousemen**—Burden of Proof.—When plaintiff showed that automobile was in good condition, and that all parts and tools were there when he delivered it to defendant warehouseman and many missing when returned, burden was on defendant to show want of negligence. — Gilbert v. Hardimon, S. D., 168 N. W. 25.

95. **Waters and Water Courses**—Diversion.— Water Supply Act, requiring state comptroller's certificate of names of corporations owing money to state for diversion of water to be filed between January 1st and February 15th, is not mandatory, and omission to file it before latter date did not forfeit state's right to collect sums thereafter certified.—East Jersey Water Co. v. Board of Conservation & Development, N. J., 103 Atl. 853.

96.——Incidental Injury. — Principle that no one may accumulate storm water on his land so as to throw it on his neighbor in concentrated form and force, to neighbor's injury, cannot be successfully invoked by one who contracts with his neighbor to do something from which injury results to him as an incidental, if not necessary, consequence of the act. — Kirkland Distributing Co. v. Seaboard Air Line Ry., S. C., 96 S. E. 122.

97. **Wills** — Contingent Remainder. — Where testatrix left her entire residuary estate in trust for two unmarried sisters, or the survivor, and on the survivor's death directed that it vest in testatrix's heir at law, as specified in an item of the will, the legatees named in such item took vested, and not contingent, remainders.—In re Stocker's Estate, Pa., 103 Atl. 885.

98. **Witnesses** — Cross-Examination. — In an action for injuries received by plaintiff, a servant, in an explosion, it was proper to exclude on his cross-examination a question as to whether his superior had told plaintiff that during superior's absence he would not be required to use explosives. — Titusville Fruit & Farm Lands Co. v. Porter, U. S. C. C. A., 249 Fed. 442.

99.——Cross-Examination.—Where witness for prosecution gave no testimony on direct examination upon subject of his knowledge regarding grand jury proceedings, exclusion of cross-examination as to his knowledge whether property generally described in indictment was produced before grand jury was proper, despite defendant's contention that there was a variance between description in indictment and grand jury's knowledge. — Feener v. United States, U. S. C. C. A., 249 Fed, 425.

100.——Wife.—Where wife was called as witness by party adverse to husband, and there was no objection as to her competency to testify without his consent, her testimony was properly in evidence, and failure to object was equivalent to consent, as required by Comp. Laws 1913, § 7871.—Evenson v. Nelson, N. D., 168 N. W. 36.